SOME ASPECTS OF THE LAW OF LIBEL, APPLICABLE TO NEWSDEALERS.

The administration of justice is deemed by the laity a very simple matter. They by no means conceive the intricacy of the affairs which courts are called on to unravel nor the strong equities which often clamor for each of the contending parties. Said a German farmer to the writer: "The Judges of the Supreme Court have an easy time. They just sit there and decide, and I suppose, too, that everything goes by favor." The speaker was a prominent and well-to-do man in his town, often its chairman and once a member of the State Legislature. His sentiment, I take it, is the sentiment of very many, perhaps most, rural and unsophisticated persons.

Yet, after all, Lord Chief Justice Russell was right in saying that: "Justice and its administration are amongst the prime needs and business of life." Exact justice is often impossible, yet the law seeks and, in the main we may believe, the courts attain far better results than would be reached if their functions were confided to those humane and upright, but unlearned persons, who very sharply attack the bench and more than intimate that they themselves could do better.

When King James the First sought to take to himself the decision of cases pending in his Majesty's Courts he soon felt the difficulty and expressed it with his usual clumsy misapprehension. "I could get along very well," said the royal pedant, "hearing one side only, but when both sides have been heard, by my soul, I know not which is right."

Libel is by no means a rare action in this country, as a glance at the American Digest will show. Thus, in 1893, we find there digested 187 points in the law of libel, 23 of them in criminal cases. In 1894, 181 points, 13 of them in criminal cases. In 1895, 193 points, 21 in criminal cases. In 1896, 236 points, 20 in criminal cases.

Now the rules of liability to which persons are held in libel are often of the less simple and palpable character. It

is always hard to believe that persons morally innocent can be legally condemned. That those who committed no crime and intended no crime and have been personally knowing of no crime can yet be successfully charged with responsibility for it.

The liability of a newsdealer from whose shop a libelous publication is sold without his procurement or knowledge sometimes presents a case where the scales seem closely balanced. The libel is quite as injurious to the wronged person as any other. It seems he ought not to be remediless. Yet the newsdealer himself has wittingly offended in no way, and is, perhaps, guilty of no moral crime. Though actions for libel are not uncommon with us, English courts and juries seem to so greatly favor large recoveries in cases of this sort, often upon comparatively slight showing, that this form of action seems particularly prevalent in the British Isles. We must look, therefore, to English Reports for fuller and more varied consideration of the various liabilities arising under this head. There we find this liability of the newsdealer much considered.

Thus, in *Dominus Rex* v. *Elizabeth Nutt*, Fitzgibbon, 47, (same case, 1 Barnardiston, K. B. 306,) information for publishing a treasonable libel was tried at the Guildhall before Raymond, Chief Justice, where, upon the evidence it appeared that the defendant kept a pamphlet shop and that this libel was sold in the same shop by the defendant's servant for the defendant's use and account, in her absence and that she did not know the contents of it, nor of its coming in or going out; *et per* Raymond, Chief Justice: "Notwithstanding, the defendant is guilty of publishing this libel, the shop being kept under her authority and direction; and 'twould be of very dangerous consequence that the law were otherwise; and it has been so ruled in a great many instances." Mr. Kettleby, in Barnardiston's Report, is reported as urging, "indeed, the act of a servant may charge a mistress in a civil suit, yet it was by no means reasonable it should charge her in a criminal prosecution;" and in Fitzgibbon, "If a post-boy should carry a libel sealed up, into the country, must he be punished

for it?" To which Raymond, Chief Justice, answered, "That there the question would be, whether such carrying by a post-boy would be deemed in law a publication; and in all these cases the mischief is equal, though the parties' intention do not concur." In Banardiston's Report the Chief Justice is reported as answering that the case of the post-boy was not at present in question. "But he observed that if a servant carries a libel for his master, he certainly is answerable for what he does, though he cannot so much as write or read." The jury being unwilling to agree upon a verdict, the Attorney-General consented a juror should be withdrawn, which was accordingly done.

In *King* v. *Dodd*, 2 Sessions Cases, 33, (Hilary, 10 Geo. K. B.,) an information was moved for against the defendant for selling and publishing a libel against one Chambers, and it was insisted on for the defendant that she was sick and that her servant took the libel into her shop without her knowledge. But, by the Court: "this is no excuse, for a master shall answer for his servant, and the law presumes him to be acquainted with what his servant does. Mr. Justice Fortescue said that it had been ruled that the finding of a libel on a bookseller's shelf was a publication of it by the bookseller. And Lord Chief Justice Raymond said that it hath been held that where a master liveth out of town, and his trade is carried on by his servant, the master shall be chargeable with the servant's publishing a libel in his absence."

In 1770, was decided the famous case of *Rex* v. *Almon*, 5 Burrows, 2686. In this case the defendant had been convicted of publishing a libel, (Junius' Letters,) in a copy of a magazine called the "London Museum," which was bought at his shop and even professed to be "printed for him." His counsel moved, on Tuesday, the 19th of June, 1770, for a new trial, upon the foot of the evidence being insufficient to prove any criminal intention in Mr. Almon, or even the least knowledge of these magazines being sold at his shop. And they had affidavits to prove that it was a frequent practice in the trade for one publisher to put another publisher's name to a pamphlet, and that this was the present case, and this

was without defendant's knowledge or approbation. That, as soon as he saw his name put to the publication in question, he sent a note expressing his disapprobation to the real publisher. That he himself had no concern whatever in the London Museum." That he was not at home when they were sent to his shop. That the whole number sent to his shop was three hundred. That about sixty-seven of them had been sold there by a boy in his shop, but without Mr. Almon's own knowledge, privity, or approbation. That as soon as he discovered it he stopped the sale, ordered the remainder to be carried up into his garret, and took the first oppurtunity to return them to Mr. Miller. That it was not proved that the person who sold them was Mr. Almon's servant or employed by him, or that Mr. Almon was at all privy to the sale.

Sergeant Glynn stoutly argued that the proof against Mr. Almon appeared therefore to be defective: there was nothing to constitute criminality or induce punishment. He further offered the affidavit of one of the jury that he, the juror, understood Lord Mansfield to say that bare proof of the sale in Mr. Almon's shop without any proof of privity, knowledge, etc., was conclusive evidence, and that if he had understood the jury were at liberty to exercise their own judgment, he would have acquitted the defendant. The Court very peremptorily refused to allow the affidavit to be read, but Lord Mansfield said he had been properly understood. That the substance of what he had said was "that in point of law the buying of the pamphlet in the public open shop of a known, professed, bookseller and publisher of pamphlets, of a person acting in the shop, *prima facie*, is evidence of a publication by the master himself; but that it is liable to be contradicted, where the fact will bear it, by contrary evidence tending to exculpate the master and to show that he was not privy nor assenting to it nor encouraging it. That this being *prima facie* evidence of a publication by the master himself, it stands good till answered by him, and if not answered at all it thereby becomes conclusive so far as to be sufficient to convict him. In practice, in experience, in history, in the memory of all persons living, this is, I believe, the first time it was ever

doubted that this is good evidence against a bookseller or publisher of pamphlets. The constant practice is to read the libel as soon as ever it has been proved to be bought at the defendant's shop. This practice shows that it is considered already proved upon the defendant; for it could not be read against him before it had been proved upon him." He declared this as much established as that the eldest son is heir to his father, and all the judges warmly concurred.

The King v. *Woodfall*, Lofts, 776, was the yet more celebrated case in which the principal publishers of Junius Letters were prosecuted in 1774 for a libel on the revolution and on the persons of King William and Queen Mary. Counsel for defendant said, in closing, "What is there to fix it on the defendant, who was in prison and ignorant of the publication?" Lord Mansfield, "Whenever a man publishes he publishes at his peril, for there is no entering into the secret thoughts of a man's heart. If he had been in close custody so that his servant could have no access there, I should have thought it a difference very proper to have been left to you; but it is just the same as in his own house; for his servants and all the world had access; and the boy brought the paper to him every day. Otherwise I should have thought the particular circumstances very proper to have taken it out of the general case; but here it is just as in the case of last Saturday. He either did or did not know it; if he did then he is answerable upon that case, if not he ought to have known it." The defendants were both found guilty and each was fined 300 marks.

Passing down from these classical days of the law, when the silver-tongued Murray was devoting his great talents to nobly and reasonably expanding the law merchant, but to ignobly and unreasonably contracting the ideas of human liberty, or, at least, to combating their development in many other lines, we find an interesting civil case in which a great judge, Lord Esher, Master of the Rolls, happily still living at a venerable age and administering his historic office, illuminates the subject. The case is *Emmens* v. *Pottle*, 16 L. R. Q. B. Div. 354 (1885–6). This was an action for 5000 pounds damages against defendants, who were news vendors, for publishing a

libel against plaintiff by selling a copy of the newspaper known as "Money," containing the defamatory matter complained of. Defendants set up that they were news vendors, carrying on a large business in London, and as such sold the copy of the periodical in the ordinary course of business, without any knowledge of its contents. The jury found that neither of the defendants knew when they sold the newspaper that it contained any libel, that they were not negligent in so failing to know, and that the newspaper was not of a character likely to contain libelous matter. The plaintiff in person argued his case, and on his saying, "If a man deals in dangerous articles he ought to be liable for an injury which is caused by them," he was interrupted by a question from Bowen, L. J., "Are you not bound to show that a newspaper is in its nature a dangerous thing?" In the principal opinion, Lord Esher, M. R., observed, "I agree that the defendants are *prima facie* liable. They have handed to other people a newspaper in which there is a libel on the plaintiff. I am inclined to think that this called upon the defendants to shew some circumstances which absolve them from liability, not by way of privilege, but facts which shew that they did not publish the libel. We must consider what the position of the defendants was. The proprietor of a newspaper who, publishes the newspaper by his servants, is the publisher of it, and he is liable for the acts of his servants. The printer of the paper prints it by his servants and therefore he is liable for a libel contained in it. But the defendants did not compose the libel on the plaintiff, they did not write or print it, they only disseminated that which contained the libel. The question is whether, as such disseminators, they published the libel. If they had known what was in the paper, whether they were paid for circulating it or not, they would have published the libel and would have been liable for so doing. That, I think, cannot be doubted. But here upon the findings of the jury we must take it that the defendant did not know that the paper contained a libel. I am not prepared to say that it would be sufficient for them to shew that they did not know of the particular libel; but the findings of the jury make it clear that

the defendants did not publish the libel. Taking the view of the jury to be right, that the defendants did not know that the paper was likely to contain a libel, and, still more, that they ought not to have known this, which must mean, that they ought not to have known it, having used reasonable care—the case is reduced to this, that the defendants were innocent disseminators of a thing which they were not bound to know was likely to contain a libel. If they were liable the result would be that every common carrier who carries a newspaper which contains a libel would be liable for it, even if the paper was one of which every man in England would say that it was not likely to contain a libel. To my mind the mere statement of such a result shews that the proposition from which it flows is unreasonable and unjust. The question does not depend on any statute but on the common law, and in my opinion, any proposition, the result of which would be to shew that the common law of England is wholly unreasonable and unjust, cannot be part of the common law of England." Bowen, L. J., said further, "The jury have found as a fact that the defendants were innocent carriers of that which they did not know contained libelous matter and which they had no reason to suppose was likely to contain libelous matter. A newspaper is not like a fire; a man can carry it about without being bound to suppose that it is likely to do any injury. It seems to me that the defendants are no more liable than any other innocent carrier of an article which he has no reason to suppose likely to be dangerous. But I by no means intend to say that the vender of a newspaper will not be responsible for a libel contained in it if he knows or ought to know that the paper is one which is likely to contain a lible." Plaintiff's appeal dismissed.

In *Regina* v. *Judd*, 37 Weekly R. 143, (1888), the High Court held that where the "St. Stephen's Review" was printed by a limited corporation for the proprietors of the Review and the latter published it, under the rule of *Emmens* v. *Pottle* (*supra*) the directors of the printing company who knew nothing of the contents of the Review were liable neither criminally nor civilly.

In line with the suggestion of the last cases it has been held, limiting some earlier dicta, that if a porter in course of business delivers parcels containing libelous hand-bills he is not liable for libel, if shown to be ignorant of the contents of the parcel, for he is but doing his duty in the ordinary way: *Day* v. *Bream*, 2 Moody & Rob. 54.

The case of *Street* v. *Johnson*, 80 Wis. 455, decided in 1891, briefly reviews the earlier cases in deciding on the liability of a defendant sued for a libel upon the members of the W. C. T. U., contained in "The Sunday Sun," sold by him at his news stand. The learned Chief Justice, speaking for the court, says: "The authorities are to the effect that the mere seller of newspapers is not liable for selling and delivering a newspaper containing a libel upon the plaintiff if he can prove upon the trial, to the satisfaction of the jury, that he did not know that the paper contained a libel, that his ignorance was not due to any negligence on his part, and that he did not know and had no ground for supposing that the paper was likely to contain libelous matter." Citing various English and American cases, and continuing, "But it seems to be equally well settled that such sale and delivery of a newspaper containing a libel is, *prima facie*, the publication of such libel, and hence makes such vendor, *prima facie*, liable therefor." As it is summed up by Mr. Townsend in his excellent work on Slander and Libel (4th edition), section 124, "The proprietor of a bookstore or newspaper store is responsible for the contents of every book and paper sold in his store, unless he can prove that he did not know and had no reason to suppose that the book or paper contained any defamatory matter."

Of course, in general, the doctrine "*qui facit per alium facit per se*" applies to the liability for libel by the agent or associate of the accused: Newell on Def. Slander and Libel, page 228, citing Flood on Libel and Slander, page 43.

But as a part of this rule the liability of the dealer for the publication of a libel by his agent evidently depends upon such publication being in the course of the business or employment authorized.

So it has been held that one partner, in the business of selling furniture and draperies, was not liable for a libelous placard placed, without his knowledge or consent, by his co-partners upon a table in front of their shop, which read as follows: "Taken back from Dr. W., who could not pay for it, to be sold at a bargain;" and on a separate card, "Moral: Beware of dead-beats." The court says, "There is nothing in the nature of the business of this firm . . . from which authority to one partner or to a servant to gratuitously publish a libel can be implied. The case is different from that of a partnership whose business is publishing or selling either books or newspapers, where each partner is supposed to have authority to publish or sell, and to determine what shall be published or sold, and also from that of the necessary correspondence of a firm where each partner is presumed authorized to conduct it and to determine on its substance and terms." See *Woodling* v. *Knickerbocker*, (Minn.) 17 N. W. 387.

From this brief collocation of cases and authorities we may conclude that a newsdealer is not liable under our own or English law for the sale in his shop, even by his own hand, of a libelous publication if he did not know it to be such, had no occasion to suspect that it contained libelous matter, and was guilty of no negligence in not discovering its character. But that, since the partner or servant of a newsdealer is authorized to give out for him whatever is in the line of goods dealt in, that the absent partner or master is liable for the act of the representative or servant in the course of the business, as if the act were his own. That, under the general doctrines applicable to principal and agent, neither newsdealer nor other dealer is liable for unauthorized acts of partner or servant done without his knowledge and outside of the scope of the partnership or agency; but that as to all sales of publications coming within a news vendor's business, he is liable, if made in his shop in his absence, in the same manner as if he were present.

It seems, thus, that an innocent person may be guilty of libel through the act of one for whom he is responsible. That this hardship upon the innocent culprit is logical and necessary

to protect the equally innocent and otherwise defenseless injured person from that blighting crime of defamation

> "Whose edge is sharper than the sword, whose tongue
> "Outvenoms all the worms of Nile, whose breath
> "Rides on the posting winds, and doth belie
> "All corners of the world."

Charles Noble Gregory.

College of Law,
University of Wisconsin.